SUPREME COURT, U. S.
DEC 29 19
MICHAEL ROBAK, JR.

IN THE

Supreme Court of the United States

No. 73-1020

JOSEPH DAVIS,

Petitioner,

-against-

AMERICAN EXPORT ISBRANDTSEN LINES, INC., and S.S. EXPORT COMMERCE, her engine, tackle, cargo, gear, and apparel,

Respondents,

-and-

TODD SHIPYARDS CORP.,

Third Party Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT

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TODD SHIPYARDS CORP.,

Third-Party Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled action on the 24th day of October, 1973.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of NewYork was entered February 1, 1973.

JURISDICTION

The judgment of the Court of Appeals was entered October 24, 1973. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

QUESTIONS PRESENTED

1) Where a vessel is in navigation and is under the complete control of its master, officer and crew, may a shipyard worker, engaged in routine maintenance and inspection work thereon, be deprived of the historic protection of the shipowner's warranty of seaworthiness when accidentally injured by an appurtenant part of the vessel without any explanation by the shipowner or inquiry by the court?

2) Whether res ipsa loquitor may be invoked against the vessel under circumstances where in-rem jurisdiction has been perfected; and, the shipowner is deemed to be in control thereof, but provides no explanation for the accident.

REASON FOR GRANTING THE WRIT

1. The decision is in conflict with the holding of the Circuit Court of Appeals for the Fifth Circuit under a similar factual situation; and, is contrary to the authorities extending the seaworthiness doctrine to shore based workmen performing

ordinary maintenance and inspection or minor repairs aboard a ship deemed to be in navigation.

2) The Circuit Court of Appeals has imposed an unwarranted and unprecedented limitation over the protection provided by the Sieracki[1] doctrine, heretofore not contemplated, but which should be resolved by this Court as follows:

a) That the specific detail of petitioner's job, rather than the overall extent of the shipyard work is determinative.

b) That routine maintenance and inspection work and minor repairs on the vessel herein was sufficient to deprive workmen of the warranty of seaworthiness, for injuries sustained from an appurtenance of the vessel after the completion of the work involved.

3) The court below erroneously failed to make a finding in rem liability against the vessel, despite the fact that there was no testimony on the ship's behalf to explain why or how the accident happened.

STATEMENT

The petitioner was permanently injured and totally disabled by the propeller of the S/S Export Commerce when it fell upon him off the tail-shaft accidentally and without explanation while petitioner was standing on a scaffold after having completed his job assignment on the tail-shaft which involved the loosening of

1. *Seas S.S. Co. v. Sieracki*, (328 U.S. 85, 66 S.Ct. 872, 90 L. Ed. 1099 (1946.)

the grip or seizure of the propeller hub thereon.

For this purpose and other maintenance and routine inspection work the vessel was in the Todd Shipyard for a total of approximately two days, with a full complement of men, officers and its master aboard.

A libel in rem and in personan was perfected against the vessel and the shipowner on the basis of unseaworthiness and negligence; and the shipowner, in turn, impleaded the Todd Shipyard.

The district court proceeding in admiralty without a jury concluded that the routine inspection and maintenance work on the vessel, particularly the specific details of the work of the petitioner thereon, as well as the tools employed, were sufficiently specialized to withdraw it from activities entitling workers to the warranty of seaworthiness; that it was a shipyard kind of work, on the vessel, rather than of the ship, and work by outsiders and not by the crew, and which could not be done at sea.

There simply are no cases reported in any of the Circuit Courts of Appeal throughout the United States, or in any other Federal District Court, that have been decided on the grounds used by the Court below herein; and, therefor, along with the consequent erroneous rational of the Court regarding the application of the doctrine of res ipsa loquitur, the petitioner has been effectively deprived of the benefits of the customary judicial proceedings in law to which he is entitled, in asserting his in rem and in personam claim of negligence and unseaworthiness against the vessel and the shipowner as a result of the unexplained accident or occurrence.

Clearly, the circumstances resulting in the unexplained accident or occurrence which resulted in petitioner's injuries were brought into play proximately by an unsafe condition of both the propeller and the tail-shaft from which it fell; insofar as petitioner was not engaged in working thereon at the time he was injured and the record reflects that a propeller had never fallen off a tail-shaft at Todd under the conditions herein; and, that additional force, always, had to be applied, under normal conditions, after the petitioner's detail of the work had been completed.

The percuriam affirmance by the Circuit Court of Appeals is unprecedented and an unwarranted reversal of the historic policy of this Honorable Court to expand the Sieracki doctrine for the protection of all maritime workers subjected to the same dangers entailed in their respective jobs.[2]

FACTS

The S/S Export Commerce was at the Todd Shipyard from 0548 June 29, 1970, until 0600 July 1, 1970; a period of approximately two days, for the purpose of a routine, periodic, maintenance and inspection and very minor repairs; and, prior to that time, had been actively engaged in commerce.

Admittedly, the vessel was in navigation at all pertinent times and was under the complete control of its owners, agents, representatives or employees, and the master, officers and crew

2. *Pope Talbot v. Hawn*, 346 U.S. at 412-413, 745 S.Ct. at 206-207 (98 L.Ed. at 152, 153).
Jackson v. Lykes Bros. Steamship Co., Inc., 1967, 386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed. 2d 488. At Note A.

thereof; albeit, control is only admitted to the extent that a full complement of men were assigned to the vessel and were on the payroll with normal duties being performed, logs kept, watches stood; and, that a night mate and night engineer were aboard; and, further, that the vessel was fully operational respecting its steam boilers, generators, machinery, plant, and equipment, generally.

Petitioner was injured by the falling propeller of the vessel at approximately 2000 hours on June 29, 1970, after having completed his function of preparing the propeller and tail-shaft for inspection; and, while he was standing on the scaffold thereat.

At the time petitioner was engaged on the tail-shaft outside the vessel at the stern thereof, another crew of machinists were simultaneously engaged inside the vessel on the tail-shaft preparatory to drawing the same into the shaft alley; and the two crews coordinated their efforts. There was nothing used or precautions taken to prevent the propeller from slipping off the tail-shaft.

The vessel left the shipyard just two days after entering for the minor repairs and inspection involved.

Additionally, in accord with the work contract between Todd Shipyard and the vessel owners, the Shipyard was obligated to perform the minor, periodic, maintenance work, repairs and inspection in a workmanlike manner and, were to be legally responsible for any defective workmanship and damages, otherwise, for personal injuries as a result thereof (Petitioner's Exhibit (1) on the trial).

POINT I

UNDER THE PREVAILING AUTHORITIES PETITIONER IS ENTITLED TO THE PROTECTION OF THE WARRANTY OF SEAWORTHINESS.

The S/S Export Commerce was continually in the service of ocean shipping and transportation prior to undergoing the two days of minor repairs, maintenance and inspection at the shipyard; and, immediately resumed these activities upon completion of the two (2) days of repairs.

In a similar case involving personal injuries sustained in the drydocking of a public vessel of the United States for ten (10) days, the USNS Redstone, in the case of *Rogers v. United States*[3], the District Court concluded that, (a) the vessel was not in navigation at the time of injury, (b) the plaintiff Rodgers was not performing seaman's type work, and (c) the ship was under the control of the Shipyard; and, dismissed the case.

The Court sub judice came to the identical conclusions and erroneously dismissed the libel herein, upon the same grounds.

The Circuit Court of Appeals for the Fifth Circuit however, in the *Rodgers* case, *supra*, reversed and remanded the case.

In reversing the lower Court the Fifth Circuit Court held as follows:

> "It is now well settled that the warranty of seaworthiness may extend to shore based repair workers. The

3. 452 F2d. 1149 (1972).

Tungus v. Skougaard, 1959, 358 U.S. 588; *Pope & Talbot, Inc. v. Hawn*, 1953, 346 U.S. 406. To determine whether the warranty is owed to Rodgers we must focus ".....upon the status of the ship, the pattern of repairs, and the extensive nature of the work contracted to be done,....." *West v. United States*, 1959, 361 U.S. 118, 122; *Delome v. Union Barge Line Co.*, 5 Cir. 1971, 444 F2d. 225, 231. Applying the facts to this test we find that the REDSTONE was in navigation and that Rodgers was performing work traditionally engaged in by seamen.

In the case at bar, on the S/S Export Commerce, there was no extensive work or major overhaul done; and, surely, there was only a fraction of the work performed that was done upon the REDSTONE (costing $91,142.); insofar as the REDSTONE was in the shipyard for ten days, whereas the "Export Commerce" was in the Todd Shipyard for only two (2) days at a comparative cost of $29,000.

In the *Rodgers* case, *supra*, the Court continued its reasoning as follows:

p. 1152, [4,5]

"Roper teaches that "the test for determining whether a vessel is in navigation is the 'status of the ship', *West v. United States*, 361 U.S. 118, 122 (1959)."

In *West* the ship had been in "moth-balls" and was undergoing renovation to make her seaworthy again. Because of the magnitude of the undertaking and the fact that the contractor had complete control of the ship for this purpose, the Court held that the ship was not in maritime service (navigation). Here, the REDSTONE, far from being in moth-balls prior to undergoing repairs, was actively engaged in maritime commerce and immediately

resumed these activities upon completing ten days of repairs."

The Todd Shipyard in this case was engaged for only two days by the shipowner; and, in addition, the Court below acknowledged that the S/S Export Commerce was in navigation at the time petitioner suffered his injuries.

The Fifth Court of Appeals in *Rodgers, supra,* said:

p. 1152, [4,5]

".....The repairs are similar to those in *Union Barge Line Corp., v. Allen,* E.D.La. 1965, 239 F.S. 1004, aff'd. 5 Cir. 1966, 361 F.2d 217 and *Lawlor v. Socony-Vacuum Oil Co.*, 2 Cir. 1960, 275 F. 2d 599, cert. den. 363 U.S. 844. They are not sufficient, in legal contemplation, to take the ship out of navigation."

The similarity between the petitioner's case and the case of *Union Barge Line Corp. v. Allen,*[4] *supra,* is even greater than in the *Rogers* case, *supra.*

The claimant Allen was working on the tail-shaft of the vessel when he was injured in the capacity of a machinist engaged in removal of the tail-shaft for replacement of a sleeve-bearing, and the "Allen" job required the removal of the propeller as well; Joseph Davis the petitioner, was also working on the tail-shaft of the vessel for the purpose of loosening the propeller and removal of the tail-shaft for inspection.

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4. *Allen v. Union Barge Lines, Inc.*, 293 F.S. 1004 (E.D. La. 1965) affd. 361 F.2d 217 (5th Cir. 1966) cert. den. 385 U.S. 1006, 875 Ct. 713, 17 Led. 2d 545 (1967).

No two jobs could have had a greater similitude; furthermore, any valid distinction, if at all, "in legal contemplation" would redound, obviously, to the benefit or advantage of the petitioner; for, he was not injured as a result of a fall from a defective shipyard scaffold timber or plank, as Allen was; but, on the contrary, by an appurtenant part of the vessel itself, namely, the propeller.

In the *Allen* case, *supra*, the District Court held, 239 F.S. 1008 (1965) [6] 4.

> "After considering all of these elements, the Court concludes as a matter of law, that in view of the pattern of the repairs and the nature of the work to be done by both Dravo and the engineering crew aboard, the M/V Mariner was a vessel in navigation at the time of libelant's injury; that libelant was performing work traditionally performed by seamen (removing a bearing from a propeller shaft); and, that he was, at the time of his injury, entitled to the warranty of seaworthiness. *Lawlor v. Socony-Vacuum Oil Co., supra.*"

Whether a machinist is engaged to loosen a propeller or a sleeve-bearing from the tail-shaft of a vessel, this Honorable Court has provided the same protection of the warranty of seaworthiness to all similarly employed, without any distinction whatever, because both jobs entail the same hazards or inherent dangers; and, men employed in this capacity are fundamentally entitled to equal rights under the laws of admiralty.

It is patently inequitable, to say the least, to hold, as in this case, that a machinist, engaged in the removal of sleeve-bearings from a tail-shaft of one ship, is protected by a shipowner's warranty of seaworthiness; but, that a machinist engaged on

another vessel, in merely loosening a propeller on a similar tail shaft, is not and cannot be protected.

This is not the kind of distinction or differentiation in personalities or work areas that American Jurisprudence entertains; particularly within the Admiralty Courts of the United States.

The Court below preferred to decide against the petitioner on just such an inequitable basis, merely by a laborious dissertation of the specific type of work done by petitioner herein; patently, in a strained effort to classify it as specialized, in order to justify a deprivation of petitioner's valid claim; albeit, as the record reflects, no special skills or tools were required in any case. Capt. Swenson testified that any able bodied seaman could do the job. (Op. A-118)

The *Rodgers* Court, *supra*, stated:

P. 1153 [7,8]

"The mere fact that the shipowner contracts work to a third party in order to take advantage of the skill brought about by the modern division of labor does not release him from his responsibility of providing shore workers with a seaworthy vessel. *Seas Shipping Co. v. Sieracki*, 1946, 325 U.S. 85, 100". . . . "Applying the *West* test we must look to the pattern of repairs and the extensive or limited nature of the work contracted to be done rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of the injury in determining whether the work was traditionally that of a seaman. *Delome v. Union Barge Line Co., supra*, at 232; *Johnson v. Oil Transport Co., supra*, at 117; *Watz v. Zapata Off-Shore Co., supra*, at 108.

In *Delome v. Union Barge Line Company*, 444 F 2d 225 (1971) p. 231, par. B, the Court stated:

> "To determine whether a warranty of seaworthiness is owed shoreside workers, examination of three status-oriented factors becomes essential. We focus on "the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, rather than the specific type of work that each of the numerous shore based workmen is doing at the moment of injury." *West v. United States*, 1959, 361 U.S. 118, 122, 80 S.Ct. 189, 192, 4 L.Ed. 2d, 161, accord, *Watz v. Zapata Off-Shore Co.*, 5th Cir. 1970, 431 F. 2d 100, 108; *Moye v. Sioux City & New Orleans Barge Lines, Inc., supra*, 402 Fed. 2d at 240.

On page 232 the Court continued:

> ".....Nevertheless, a vessel which temporarily leaves commerce, enters a shipyard for minor repairs, and thereupon returns to commerce remains in navigation for the purposes of the warranty. See *Drake v. E.I. Dupont de Nemams & Co.*, 5th Cir. 1970, 432 F. 2d 276, 277-278; *Martin v. Jones*, E.D. La. 1968, 296 F.S. 878, 881; *Rodgers v. M/V Ralph Ballniger, supra, Allen v. Union Barge Line Corp., supra*, 239 F.S. at 1007; *Hilton v. Aegean Steamship Co., supra.*"

The petitioner's Exhibit (1) on the trial in the district court indicates that only minor repairs were performed on the S/S Export Commerce; and, it is not disputed that the vessel was in the Todd Shipyard temporarily, for the routine, periodic, maintenance and inspection work, and, thereafter, immediately returned to sea and was actively engaged in commerce.

Where minor repairs are involved, as in this case, since the vessel was in drydock for only two days, clearly, the injured shore-worker is protected by the warranty of seaworthiness.[5] Furthermore, this Honorable Court has indicated that the Sieracki doctrine should be expressed expansively.[6]

POINT II

RES IPSA LOQUITUR APPLIES TO THE SHIPOWNER IN CONTROL OF A VESSEL AND ITS APPURTENANCES.

The Court below erroneously held that the minor repair work on the S/S Export Commerce was under the sole supervision of the Todd Shipyard, on its own drydock; and, that if res ipsa loquitor were to be invoked, it would be directed to Todd and not the ship. (Op. A-50).

Yet the Court below failed to apply the doctrine either to the shipowner or to the shipyard, holding that,

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5. *Third Circuit—Read v. United States,* (1953, CA 3 Pa) 201 F 2d 758; *Reinman v. A.H. Bull S.S. Co.,* (1952 D.C. Pa) 107 F.S.153, aff'd. (CA 3) 216 F 2d 939;

Fourth Circuit—Ress v. The Zieland, (1957 CA 4 Va) 240 F 2d 820;

Fifth Circuit—Pinion v. Mississippi Shipping Co., (1957, D.C. La.) 156 F.S. 652.

Sixth Circuit—Pioneer S.S. Co. v. Hill (1955 CA6 Ohio) 227 F 2d. 262;

Ninth Circuit—Morrell v. United States, (1960, D.C. Cal.) 193 F.S. 705, aff'd (CA 9) 297 F 2d. 662.

6. *Jackson v. Lykes Bros. S.S. Co. Inc.,* 1967—386 U.S. 731, 87 S.Ct. 1419, 18 L. Ed. 2d 488, at Note 4.

"Where, as in *Gibbs v. Kiesel*, 5th Cir. 1967, 382 F 2d 917, 'unexplained' accident is found to disclose unseaworthiness, the terms of the accident are such as to imply a defect in structure. (as in *Oliveras v. American Export Isbrandtsen Lines*, 2 Cir. 1970 431 F 2d 814), (Op. A-50) or, as in *Gibbs*, a defect in rig. Here, the accident implies nothing of defect; no inference of structural defect nor of operational misconduct that could produce the event arises from its happening....."

This holding establishes gross error, for it conflicts with the record, insofar as testimony by Todd's foreman, La Garde, indicates that propellers do not fall off by themselves when loosened; but, must, under *normal* conditions, be jacked or forced off the tail-shaft of a vessel, after they have been loosened as the propeller was in this case.

It is, therefore, inescapable that the propeller fell off the tail-shaft by reason of some latent defect, and, the shipowner, having provided no explanation whatever, should have been held liable for breach of warranty of seaworthiness by the Court below. Nevertheless, the Court made no inquiry whatever, in this regard.

In *Rodgers v. U.S., supra*, the Court said:

P. 1152 [4,5]

".....Even if the yard workers had control over the particular area where they were working, and, here they did not, the warranty survives when the owner remains in general control of the vessel. *Johnson v. Oil Transport Co., supra*, at 114; *Lawlor v. Socony Vacuum Oil Co., supra*, at 604."

In this case, there is no relinquishment of control, whatever, because the shipowner was actively engaged in conducting his own repairs with his own complement of men, hired welders, etc., as shown by petitioner's Exhibit 1, on the trial; and, the Court below completely *ignored this vital fact* regarding the res ipsa doctrine.[7]

Additionally, the fact that in rem jurisdiction had been perfected against the vessel, the Court below was obliged to require the shipowner to provide an explanation for the accident; and, its failure to inquire in this regard, coupled with the neglect of the shipowner to provide any explanation whatever, created a presumption of unseaworthiness against the vessel for which the shipowner must be held liable. See *Johnson v. Oil Transport*, (440 F 2d at 115 (3) footnote 6).[8]

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7. See generally *Johnson v. U.S.*, 333 U.S. 46; 68 S.Ct. 381.

8. *Grigsby v. Coastal Marine Service of Texas, Inc.*, 412 F. 2d 1011 (1969) (11) p. 1030.

Rice v. New York Top Rock Corp., 198 F.S. 346, aff'd. petition of Rice, 294 F.2d, 272 (3,5) at 275.

Gilmore & Black, The Law of Admiralty, p. 494; *The Barnstable*, 1901, 181 U.S. 464, 21 S.Ct. 684; *The Stamford*, D.C.S.D.N.Y. 1929, 35 F. 2d. 55.

North American Dredging Co. v. Pacific Mail S.S. Co., 185 F. 698 (9th Cir. 1911); *The Anaces*, 93 F. 240 (4th Cir. 1899); *The Elton*, 83 F. 519 (4th Cir. 1897); *The Carolina*, 32 F. 112 (C.C.E.D.N.Y. 1887); *The State of Maryland*, 85 F. 2d 944, 1936 A.M.C. 1515; (4th Cir. 1936; *The Bulley*, 138 F. 170 (S.D.N.Y. 1905); *The General De Sonis*, 179 F. 123 (W.D. Wash. 1910) *The Anaces*, 93 F. 240 (4th Cir. 1899); *The Cristobal Colon*, 44 F. 803 (F.D.La. 1890).

CONCLUSION

The petitioner was injured by an appurtenance of the S/S Export Commerce while in navigation and under the possession, management and control of the shipowner, and was entitled to the protection of the warranty of seaworthiness, because he was engaged in minor repairs, not requiring special skills, and routine, periodic, maintenance and inspection work.

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